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In the Supreme Court of the United States

OCTOBER TERM, 1978

INTERSTATE COMMERCE COMMISSION, PETITIONER

v.

SEABOARD ALLIED MILLING CORP., ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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v.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The Interstate Commerce Commission petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, pp. 1a-19a)[1] is reported at 570 F.2d 1349. The decisions of the Interstate Commerce Commission (Apps. D and E, pp. 23a-31a) are not reported.

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[1] "App." refers to the appendix to this petition.

JURISDICTION

The judgment of the court of appeals (App. B, pp. 20a-21a) was entered on February 16, 1978. The Commission's timely petition for rehearing was denied on May 12, 1978 (App. C, p. 22a). On July 31, 1978, Mr. Justice Blackmun extended the time for filing a petition for a writ of certiorari to September 9, 1978. On September 1, 1978, Mr. Justice Blackmun further extended the time for filing a petition for a writ of certiorari to October 9, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and 2350(a).[2]

QUESTION PRESENTED

Whether an Interstate Commerce Commission decision not to investigate a proposed rail rate increase in advance of its effectiveness is judicially reviewable.

STATUTES INVOLVED

1. Section 13(1) of the Interstate Commerce Act, 24 Stat. 383, as amended, 49 U.S.C. 13(1), provides:

> Any person, firm, corporation, company, or association, or any mercantile, agricultural, or manufacturing society or other organization, or any body politic or municipal organization, or any common carrier complaining of anything done or omitted to be done by any common carrier subject to the provisions of this chapter in contravention of the provisions thereof, may apply to said Commission by petition, which shall

[2] The Interstate Commerce Commission is authorized by statute to file this petition. 28 U.S.C. 2350(a).

briefly state the facts; whereupon a statement of the complaint thus made shall be forwarded by the Commission to such common carrier, who shall be called upon to satisfy the complaint, or to answer the same in writing, within a reasonable time, to be specified by the Commission. If such common carrier within the time specified shall make reparation for the injury alleged to have been done, the common carrier shall be relieved of liability to the complainant only for the particular violation of law thus complained of. If such carrier or carriers shall not satisfy the complaint within the time specified, or there shall appear to be any reasonable ground for investigating said complaint, it shall be the duty of the Commission to investigate the matters complained of in such manner and by such means as it shall deem proper.

2. Section 15(8) of the Act, as added by Section 202(e)(2) of the Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. 94-210, 90 Stat. 37, 49 U.S.C. 15(8), provides in pertinent part:

(a) Whenever a schedule is filed with the Commission by a common carrier by railroad stating a new individual or joint rate, fare, or charge, or a new individual or joint classification, regulation, or practice affecting a rate, fare, or charge, the Commission may, upon the complaint of an interested party or upon its own initiative, order a hearing concerning the lawfulness of such rate, fare, charge, classification, regulation, or practice. The hearing may be conducted without answer or other formal pleading, but reasonable notice shall be provided to in-

terested parties. Such hearing shall be completed and a final decision rendered by the Commission not later than 7 months after such rate, fare, charge, classification, regulation, or practice was scheduled to become effective, unless, prior to the expiration of such 7-month period, the Commission reports in writing to the Congress that it is unable to render a decision within such period, together with a full explanation of the reason for the delay. If such a report is made to the Congress, the final decision shall be made not later than 10 months after the date of the filing of such schedule. If the final decision of the Commission is not made within the applicable time period, the rate, fare, charge, classification, regulation, or practice shall go into effect immediately at the expiration of such time period, or shall remain in effect if it has already become effective. Such rate, fare, charge, classification, regulation or practice may be set aside thereafter by the Commission if, upon complaint of an interested party, the Commission finds it to be unlawful.

(b) Pending a hearing pursuant to subdivision (a), the schedule may be suspended, pursuant to subdivision (d), for 7 months beyond the time when it would otherwise go into effect, or for 10 months if the Commission makes a report to the Congress pursuant to subdivision (a) * * *.

* * * * *

(f) In any hearing under this section, the burden of proof is on the common carrier by railroad to show that the proposed changed rate,

fare, charge, classification, rule, regulation, or practice is just and reasonable. * * *

STATEMENT

1. Pursuant to newly adopted regulations (49 C.F.R. 1109.10), the Southern Freight Association proposed certain "demand-sensitive," limited-duration rate increases for the rail transportation of 29 specified grains.[3] Respondents protested these rate increases, alleging that the rates would be unjust and unreasonable, unjustly discriminatory, and unduly preferential, in violation of Sections 1(5), 2, and 3(1) of the Interstate Commerce Act, 49 U.S.C. 1(5), 2, 3(1), and also that the rates would violate the long-and-short haul provisions of Section 4 of the Act, 49 U.S.C. 4. Respondents sought rejection of the tariffs or suspension of their operation pending an investigation.

The Commission found "no valid reason" to reject the tariffs (App., p. 24a), and it declined to suspend

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[3] The proposed rail rate increases, effective between September 15 and December 15, 1977, were the first such filings under Section 15(17) of the Interstate Commerce Act, 49 U.S.C. 15(17), added by Section 202(d) of the Railroad Revitalization and Regulatory Reform Act of 1976 (4R Act), Pub. L. No. 94-210, 90 Stat. 36. Section 15(17) directs the Commission to establish "standards and expeditious procedures for the establishment of railroad rates based on seasonal, regional, or peak-period demand for rail services." The aim was to give shippers an "incentive * * * to reduce peak-period shipments, through rescheduling and advance planning" (*ibid.*).

The Southern Freight Association is an authorized tariff agent for railroads in its territory (App., p. 3a).

their operation or to institute an investigation into their lawfulness under Section 15(8)(a), 49 U.S.C. 15(8)(a) (App., pp. 25a-31a). The Commission found that respondents failed to support their assertions that the proposed rates would be unreasonably high, unjustly discriminatory, or unduly preferential (App., pp. 27a-28a).

Although respondents offered examples "purporting to demonstrate * * * departures" from the long-and-short haul provisions of Section 4, the Southern Freight Association presented arguments in rebuttal (App., p. 27a). The railroads assured the Commission that, if any actual Section 4 violations were to result from the proposed rates, the carriers would file appropriate tariff changes to remove the violations (*ibid.*). Although the Commission concluded that respondents' assertions concerning possible Section 4 violations were not a sufficient basis for suspending the tariffs, it "admonished" the railroads to fulfill their commitment "to take prompt action to remove [Section 4] violations * * *, if any, * * * that may be caused by application of [the proposed] demand-sensitive rates" (*ibid*).

In declining to suspend or investigate the proposed rates, the Commission took account of the clear Congressional purpose "to establish a regulatory climate conducive to rate innovation and experimentation" (App., pp. 28a-29a), the temporary nature of the proposed rate increase (*id.* at 29a), and the availability, to parties who may be adversely affected, of an alternative remedy by complaint under Section 13(1) of the Act, 49 U.S.C. 13(1) (*ibid.*) To ensure that it

would be kept apprised of the actual impact of the rate increase that it was allowing to take effect, the Commission ordered the railroads "to make weekly reports * * * demonstrating the effect of the schedules" (App., p. 28a).

2. Respondents filed petitions for judicial review of the Commission's orders.[4] The court of appeals vacated the orders and remanded the cases for further proceedings, directing the Commission to institute an investigation into the lawfulness of the tariffs under Section 15(8) (App., pp. 1a-19a).

The court characterized the "critical issue" before it as "whether jurisdiction exists to review the propriety of the Commission's termination of its investigation of the lawfulness of the proposed tariff" (App., p. 7a). Although it declined to review the Commission's decision not to suspend the tariff in question (App., p. 8a), the court of appeals concluded that it could properly review the Commission's decision not to investigate the lawfulness of the tariffs under Section 15(8)(a) of the Act (App., pp. 8a-14a). The court expressly disagreed with both the conclusion

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[4] The court of appeals initially granted a temporary stay of the Commission's orders, delaying the effectiveness of the proposed rate changes (App., pp. 5a-6a, 18a). Following the submission of briefs and oral argument on the question of a stay pending review, the court dissolved its temporary stay and allowed the rates to take effect (App., pp. 17a-19a). It ordered the railroads, however, to keep account of the charges collected under the increased rates "to enable prompt determination of overcharges should the contentions of petitioners prevail upon review" (App., p. 19a).

and the reasoning of the contrary decision of the United States Court of Appeals for the District of Columbia Circuit in *Asphalt Roofing Manufacturers Association* v. *Interstate Commerce Commission*, 567 F.2d 994 (App., p. 13a).

The court in the present case bottomed its holding on several considerations. First, it believed that this Court's decision in *City of Chicago* v. *United States*, 396 U.S. 162—which held reviewable a Commission decision to terminate an investigation—supported the reviewability of the Commission's determination here not to institute an investigation (App., pp. 10a-11a). Second, although it recognized that an adversely affected party could compel a Commission investigation of the rates by filing a complaint under Section 13(1) of the Act, the court apparently considered that remedy inadequate because "in § 13(1) proceedings the burden is on the party challenging the lawfulness of the rate," whereas "[i]n a § 15(8) proceeding the burden is on the railroad to establish the lawfulness and the reasonableness of the tariff" (App., p. 11a). Third, the court believed that the Commission's refusal to initiate an investigation under Section 15(8) "made the proposed tariff operative and placed it in effect" (App., p. 12a) and was "equivalent to a finding of lawfulness of the tariffs" (App., p. 13a).

The court of appeals concluded that "[i]t is the duty of the Commission in rate proceedings to investigate substantial issues relating to the lawfulness of the proposed tariff" (App., p. 12a), that "the Commission was derelict in its responsibility in refusing to

pursue the investigation of the substantial charges of illegality which were made" in this case (App., p. 12a), and that "the Commission's premature termination of its investigation of the § 4(1) charge" and of "the rate discrimination charges" requires a remand "for an adequate investigation" (App., p. 15a). The court directed the Commission on remand "to investigate the charges of patent illegality," to hold prompt hearings on the charges, to make detailed findings and conclusions, and to provide for appropriate refunds if the tariffs are found to be unlawful (App., pp. 15a-16a).[5]

REASONS FOR GRANTING THE WRIT

The decision of the court of appeals fundamentally misconceives the ratemaking scheme of the Interstate Commerce Act, misapplies this Court's decision in *City of Chicago* v. *United States*, 396 U.S. 162, and conflicts with a recent decision of the District of Columbia Circuit.

The Interstate Commerce Commission each year makes hundreds of discretionary decisions on whether to suspend or investigate proposed railroad rate changes before they become effective. Until the court of appeals' decision in this case, no court had ever asserted the power to review these preliminary rate assessments. The court's holding that it may properly review the correctness of an agency decision not

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[5] The court of appeals denied the Commission's petition for rehearing and suggestion for rehearing en banc (App., p. 22a).

to investigate a proposed rate change will significantly disrupt established administrative rate review procedures and will involve the courts inappropriately in the exclusively administrative function of appraising the reasonableness of carrier-made rates.

1. The ratemaking scheme for railroads under the Interstate Commerce Act functions this way. A proposed rate change must be filed with the Commission at least 30 days before it becomes effective. 49 U.S.C. 6(3). The Commission, either on its own initiative or on the basis of a complaint (or protest), "may * * * order a hearing concerning the lawfulness of such rate * * *." 49 U.S.C. 15(8)(a). The carrier has the burden in such a hearing to show that the proposed rate is just and reasonable. 49 U.S.C. 15 (8)(f).

The hearing must be completed and a final agency decision must be issued no later than seven months after the rate was scheduled to become effective (unless the Commission reports to Congress that it needs more time, in which case the final decision may be deferred for an additional three months).[6] In certain specified circumstances, the Commission may suspend

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[6] If the Commission fails to make a final decision within the applicable time period, the rate may thereafter be set aside only if, upon the complaint of an interested person, the Commission finds it to be unlawful. 49 U.S.C. 15(8)(a).

the effectiveness of the proposed rate pending completion of the hearing. 49 U.S.C. 15(8)(b).[7]

If the Commission declines to order a hearing under Section 15(8)(a), and if the proposed rate change takes effect, an affected person has a further remedy under Section 13(1) of the Act. That section provides that any person may file a complaint with the Commission concerning an allegedly unlawful rate (or any other matter). If, in response to the complaint, the carrier "shall make reparation for the injury alleged to have been done," the carrier is relieved of further liability for the alleged violation. If the carrier fails to satisfy the complaint, "or there shall appear to be any reasonable ground for investigating said complaint, it shall be the duty of the Commission to investigate the matters complained of * * *."

If "after full hearing" the Commission finds that the rate is unjust, unreasonable, or otherwise unlawful, it is authorized to prescribe the just and reasonable rate to be charged thereafter, and it may order the carrier to cease and desist from charging the unlawful rate. 49 U.S.C. 15(1). The Commission may also award damages for any injury suffered by the complaining party. 49 U.S.C. 8, 9.

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[7] The hearing and suspension provisions of Section 15(8), added by the 4R Act in 1976, are applicable only to railroads. The similar provisions of Section 15(7) remain applicable to other carriers subject to Part I of the Interstate Commerce Act. See *Trans Alaska Pipeline Rate Cases*, No. 77-452, decided June 6, 1978.

2. This Court's decision in *City of Chicago* v. *United States*, *supra*, controls this case. *City of Chicago* arose under Section 13a(1) of the Act, which provides, in terms comparable to Section 15(8)(a), that the Commission "shall have authority" to investigate a carrier's proposal to discontinue the operation of an interstate train.[8] The question was whether a court could properly review a Commission order terminating an investigation previously instituted under Section 13a(1).

The Court held: "[w]hether the Commission should make an investigation of a § 13a(1) discontinuance is of course within its discretion, *a matter which is not reviewable*" (396 U.S. at 165; emphasis added); but "when the Commission undertakes to investigate" a proposed discontinuance, a subsequent decision to terminate the investigation is judicially reviewable just like any other final decision on the merits (*id.* at 166).

The same principles are applicable here. While a decision to *terminate* a Section 15(8) investigation would be judicially reviewable, the determination whether to *institute* such an investigation is committed solely to the Commission's discretion, "a matter which is not reviewable" (396 U.S. at 165).[9]

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[8] Section 13a(1) also authorizes the Commission to require the carrier to continue the train operation for up to four months pending a hearing and decision.

[9] Agency action is subject to judicial review except where statutes preclude judicial review or "agency action is committed to agency discretion by law." 5 U.S.C. 701(a). This

That conclusion is fortified by this Court's reasoning in *Arrow Transportation Co.* v. *Southern Railway Co.*, 372 U.S. 658, and *United States* v. *SCRAP*, 412 U.S. 669, which held, in effect, that a Commission decision not to *suspend* a proposed rate change is unreviewable.[10] One of the principles underlying the decisions in those cases is that any consideration by the courts of a "claim that the carrier's proposed rates are unreasonable * * * would create the hazard of forbidden judicial intrusion into the administrative domain" (*Arrow*, *supra*, 372 U.S. at 670). Review of a no-investigation decision would require the same sort of appraisal of a rate's reasonableness that the Court characterized in *Arrow* as a "forbidden judicial intrusion" (*ibid.*).

The statutory scheme also supports the non-reviewability of a decision not to start a Section 15(8)(a) investigation. A hearing under that section must be completed and a final decision must be issued within seven (or ten) months after the rate was scheduled

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"narrow exception" is applicable here because this is one of "those rare instances where 'statutes are drawn in such broad terms that in a given case there is no law to apply' " (*Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402, 410). Indeed, it is now more broadly established that "[a]n agency's decision to refrain from an investigation * * * is generally unreviewable * * *." *Kixmiller* v. *Securities and Exchange Commission*, 492 F.2d 641, 645 (C.A.D.C.); *Union Mechling Corp.* v. *United States*, 566 F.2d 722, 724 (C.A.D.C.).

[10] Of course, the courts may properly review a suspension decision for the limited purpose of determining whether the agency has statutory authority to take such action. *Trans Alaska Pipeline Rate Cases*, No. 77-452, decided June 6, 1978, slip op. 6-7, n. 17.

to take effect. But judicial review of a no-investigation decision can be expected to consume most or all of that period, and there is no indication that Congress meant to extend the period to accommodate judicial review proceedings.

Moreover, there is available to any affected person an alternative means administratively to compel the Commission to investigate the rate once it has become effective. The Commission has an enforceable "duty" to investigate under Section 13(1) if any reasonable grounds are presented for an investigation. The availability of that administrative remedy makes it even less likely that Congress contemplated judicial review of a refusal to institute a Section 15(8)(a) investigation.[11]

3. The court of appeals apparently agreed that *City of Chicago* governs this case (App., p. 10a). But its application of the controlling principles to the circumstances of this case is seriously flawed. First, the court flatly misconceived the Commission's deci-

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[11] In a Section 13(1) proceeding, the complaining party has the burden of proof with respect to the alleged unlawfulness of the rate, whereas in a Section 15(8)(a) proceeding the carrier has the burden of showing that the proposed rate "is just and reasonable." 49 U.S.C. 15(8)(f). But that procedural difference in the two remedies does not diminish the importance of the Section 13(1) remedy. The court of appeals mistakenly believed that the Commission has "limited its authority in [Section 13(1)] cases to the issue of whether the rate as applied is discriminatorily prejudicial or illegal" (App., p. 11a). A complaint under that section may address "anything done or omitted to be done * * * in contravention of the provisions" of the Act. The Commission imposes no limitation on its statutory authority in such cases.

sion, characterizing it repeatedly as an "order *terminating* the investigation" (App., p. 13a, emphasis added; see also App., pp. 7a, 9a, 10a, 12a, 14a, 15a, 16a, 21a). The Commission in fact declined to *institute* an investigation. Unlike the situation in *City of Chicago*, the Commission here did not terminate an investigation that had previously been undertaken.

Second, the court assumed erroneously that the decision not to investigate a rate change "places the proposed tariffs in effect and is equivalent to a finding of lawfulness of the tariffs" (App., p. 13a). On the contrary, it is the decision not to *suspend* a rate change that allows the tariff to take effect. And as this Court stated in *SCRAP*, *supra*, the "preliminary [reasonableness] assessment commonly made in suspension orders" does "not represent a final determination by the Commission that any particular rate [is] just and reasonable" (412 U.S. at 692, n. 16). The same is true of decisions not to investigate.[12]

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[12] The court of appeals apparently attached importance to respondents' allegations that the tariffs in question were "patently illegal" (see App., pp. 12a, 13a, 14a, 15a, 16a). The Commission does have authority to reject for filing a tariff that fails to comport with procedural or formal requirements or that is a patent nullity. See 49 U.S.C. 6(9); *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U.S. 332, 347; *North Central Truck Lines, Inc.* v. *Interstate Commerce Commission*, 559 F.2d 802, 804 (C.A.D.C.). But the Commission found no basis for rejecting the tariffs in this case (App., p. 24a), and, while we assume that a decision to reject or not to reject a tariff is judicially reviewable, the court of appeals did not here profess to review the agency's rejection decision. Rather, it reviewed the decision not to investigate a tariff properly accepted for filing.

As a result of the court's misapprehensions, it ventured beyond proper judicial bounds and engaged in an independent appraisal of the lawfulness of the proposed rates, finding that several of respondents' allegations of unlawfulness were of "sufficient substance" to require an investigation under Section 15 (8) (a). That is precisely the sort of "judicial intrusion into the administrative domain" that *Arrow* forbids (372 U.S. at 670).

4. As the court of appeals itself acknowledged (App., p. 13a), its decision here conflicts with *Asphalt Roofing Manufacturers Association* v. *Interstate Commerce Commission*, 567 F.2d 994 (C.A.D.C.). In that case, the Commission had declined to suspend or investigate certain proposed "general" railroad rate increases. The court held that the Commission's decision not to investigate the proposed rate increases, like its decision not to suspend them, is committed solely to agency discretion and is not judicially reviewable (567 F.2d at 1001-1002).

Although the *Asphalt* case is different in two respects from the present case, neither difference is material. First, *Asphalt* arose under Section 15(7) of the Act rather than Section 15(8), which now governs all rail rate filings (see note 7, *supra*). But the terms of those two sections provide no basis for distinguishing between them on the reviewability issue. There is no reason to believe that the District of Columbia Circuit will not view *Asphalt* as controlling on the reviewability issue under Section 15 (8).

Second, *Asphalt* was a general revenue proceeding involving across-the-board rate increases applicable to all commodities, while the present case involved proposed rate changes limited to specified commodities. But that distinction has no bearing on the reviewability issue. In both kinds of proceedings, a discretionary decision must be made whether to investigate the rate proposals in advance of their effectiveness, and alternative remedies are available to any person affected by a rate change after it becomes effective.

The existence of the acknowledged conflict between the two circuits on the question of reviewability will invite forum shopping and will foster confusion over the standards governing the many hundreds of Commission decisions whether to investigate a proposed rate change. This Court should resolve the conflict.

5. The decision of the court of appeals will interfere significantly with the Commission's rate review function at the suspension and investigation stage.

When it considers whether to suspend or investigate a proposed rate change, the Commission does not always focus solely on questions of possible statutory violations. It may consider also the likelihood that such possible violations will substantially injure the public, and it may take account of other valid regulatory objectives. Since any person may file a complaint under Section 13(1) after a rate takes effect and may recover damages for any injury actually suffered, there is room for the exercise of discretion in the decision whether to start an investigation or await a possible complaint proceeding.

In the present case, for example, the Commission was not persuaded, on the basis of what it had before it, that there was a sufficient danger of significant violations to warrant either suspension or investigation in advance of the rates' effectiveness (App., pp. 27a-28a). Although respondents asserted that the proposed demand-sensitive rates would violate the long-and-short haul provisions of Section 4, the carriers disputed the assertion and assured the Commission that they would remedy any such individual violations that may occur (App., p. 27a).

The Commission concluded that no investigation was required at that time. Since the carriers stated their intention to eliminate any Section 4 complications resulting from the proposed temporary rate increases, the Commission could properly conclude that the danger of injury was minimal and that the carriers might voluntarily satisfy any complaint later filed on this basis under Section 13(1). Further, the Commission took into consideration the strong Congressional policy of the 4R Act favoring "a regulatory climate conducive to rate innovation and experimentation" (App., pp. 28a-29a).

The decision of the court of appeals would forbid consideration of these judgmental factors and would unjustifiably narrow the Commission's range of discretion under Section 15(8)(a). The court has fashioned an unprecedented rule to govern the exercise of the Commission's discretion: "It is the duty of the Commission * * * to investigate substantial issues relating to the lawfulness of the proposed tariff"

(App., p. 12a). While that may correctly characterize the Commission's responsibility under Section 13(1), there is no foundation in the statute for imposing this constraint on the Commission's threshold rate review function.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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OCTOBER 1978

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 77-1729

SEABOARD ALLIED MILLING CORP., ET AL.,
PETITIONERS,

v.

INTERSTATE COMMERCE COMMISSION, ET AL.,
RESPONDENTS.

No. 77-1770

BOARD OF TRADE OF THE CITY OF CHICAGO, ET AL.,
PETITIONERS,

v.

INTERSTATE COMMERCE COMMISSION, ET AL.,
RESPONDENTS.

On Petitions for Review of Orders of
Interstate Commerce Commission

Submitted: January 13, 1978

Filed: February 16, 1978

Before GIBSON, Chief Judge, VAN OOSTERHOUT and MATTHES, Senior Circuit Judges.

VAN OOSTERHOUT, Senior Circuit Judge.

These are consolidated actions brought to set aside the Interstate Commerce Commission's orders in Docket 36663, Demand-Sensitive Rates in Grain and Soybeans—Southern Freight Association Territory (SFA). The Commission in its orders refused to suspend and to investigate the railroads' proposed tariff providing a 20% increase in rail rates applicable from September 15 through December 15, 1977, on 29 grain products shipped to and within SFA territory and to stations in SFA territory from limited points in Illinois and Indiana. The rate increase applied only to carriage in railroad owned cars, not to carriage in privately owned cars. The increase was sought pursuant to § 202(d) of the Railroad Revitalization and Regulatory Reform Act of 1976, Public Law 94-210, 49 U.S.C. § 15(17).[1]

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[1] Such Act provides:

Within one year after February 5, 1976, the Commission shall establish, by rule, standards and expeditious procedures for the establishment of railroad rates based on seasonal, regional, or peak-period demand for rail services. Such standards and procedures shall be designed to (a) provide sufficient incentive to shippers to reduce peak-period shipments, through rescheduling and advance planning; (b) generate additional revenues for the railroads; and (c) improve (i) the utilization of the national supply of freight cars, (ii) the movement of goods by rail, (iii) levels of employment by railroads, and (iv) the financial stability of markets served by railroads. Following the establishment of such standards and procedures, the Commission shall prepare and submit to the Congress

The proposed tariff was published and filed with the Interstate Commerce Commission on August 18, 1977, by the SFA authorized agent for the interested railroads and was to become effective on September 15, 1977. Protests were filed with the Interstate Commerce Commission by some 35 separate entities or organizations representing major elements of the agricultural community including many large-scale poultry producers who used considerable quantities of transported grain. Most of them are plaintiffs or intervenors in these consolidated actions.

The issues here raised were raised before the Commission. The affected railroads responded to such protests. Included were the contentions that the Commission should suspend the tariff and investigate the charges that the tariff violated the long-and-short haul provisions of 49 U.S.C. § 4(1), that applying the increase only to railroad-owned cars was discriminatory, and that the increase did not serve the purpose of § 15(17) and the regulations promulgated thereunder, published in 49 C.F.R. §§ 1109.10 *et seq.*

On September 14, 1977, Division Two of the Commission, consisting of three members, filed a summary order reciting that 49 U.S.C. §§ 1, 2, 3, 4, and 15(c) violations had been charged but not established and denied petition for review of the tariff. On the same date the entire Commission in an order states:

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annual reports on the implementation of such rates, including recommendations with respect to the need, if any, for additional legislation to facilitate the establishment of such demand-sensitive rates.

Several protestants also claim that the proposal would result in unauthorized departures from the long-and-short haul clause of Section Four of the Act. They offer rate examples purporting to demonstrate these departures. In rebuttal, respondent presents argument and tariff citations to disprove protestants' claims. In addition, respondent states that it intends to avoid any potential Section Four violations and it commits itself to making tariff changes to remove any of these called to its attention. The evidence offered to support the alleged violations of Section Four of the Act does not warrant suspension of this proposal. However, respondents are admonished to take prompt action to remove violations of the long-and-short haul provision of Section 4(1) of the Act, if any, in connection with inter-territorial and intra-territorial movements that may be caused by application of demand-sensitive rates on whole grains between points in southern territory.

* * * *

The section 2 and 3(1) issues are based on the applicability of the proposal, notably the exclusion of movements in private cars. The Commission has long recognized the justification for disparate treatment of private equipment. See, for example, *Switching at St. Louis and East St. Louis*, 120 I.C.C. 216, 221 (1926).

Other section 2 and 3(1) matters are the result of the possibly overbroad scope of the proposal. However, insufficient evidence is available to warrant suspension on the basis of such assertions. The adverse effects predicted by protestants and the benefits advanced by SFA are

speculative. This is an experimental rate increase and there is no way to predict with certainty the overall impact of the proposal.

* * * *

This is the first proposal filed pursuant to Ex Parte No. 324 regulations. The complaint sections of the Act protect, to a certain extent, the interests of those who may be adversely affected. Weighing the contentions before us and the clear Congressional purpose to permit experimental ratemaking, we will permit this temporary adjustment to become effective.

It is ordered, that the respondent carriers file, with the Secretary of this Commission, reports relating the effect of the schedules in terms of (1) car utilization (filled and unfilled orders by car types); (2) grain movements based on specific commodities and the stations of origin and destination; (3) carloadings by car type and commodity; (4) evidence of diversion; and (5) evidence of shipper rescheduling. * * * This requirement is subject to later refinement or modification by the Commission. Since several protestants raise allegations concerning an alleged disparate treatment between railroad-owned and privately owned equipment, we will, out of caution, direct our Bureau of Investigations and Enforcement and Bureau of Operations to closely monitor this matter.

Seaboard Allied Milling Corporation, *et al.*, on petition to this court on September 14 obtained ex parte temporary stay of the Commission's orders refusing to suspend the operation of the tariff and permitting

it to become effective. Another panel of this court, after a hearing on briefs and oral argument, set aside the stay order. A copy of such order not heretofore published is attached hereto as Appendix A.

Thereafter the Commission by order dated September 23, 1977, permitted the carriers to implement its proposed tariff on one day's notice. Such notice was given and the tariff was placed in effect. This court in its order of September 22 states petitioners made a strong showing that this court has jurisdiction to grant the stay but that upon a balancing of equities the temporary stay should be dissolved. The order however provides:

> Pending our determination of the merits of the petition for review, intervenor railroads are admonished to maintain such records as will be consistent with the accounting procedures established under 49 U.S.C. § 15, par. (8)(e) to enable prompt determination of overcharges should the contentions of petitioners prevail upon review.

The Commission's order of September 23 contains substantially the same provision. Such directions were authorized by § 15(8)(e) and by general equitable principles. Such provisions at least strongly tend to indicate that uncertainty in the lawfulness of the proposed tariff exists.

Petitioners claim the Commission erred in not suspending the operation of the proposed tariff on the basis that it was patently in violation of statutory law. The United States, the Interstate Commerce Commission and the railroads all contend that the

Commission has a large degree of discretion in suspension matters and that its action in refusing to suspend the operation of the tariff is not subject to judicial review. Respectful authority supports this contention. *United States* v. *SCRAP*, 412 U.S. 669, 698 (1973); *Arrow Transportation Co.* v. *Southern Railway Co.*, 372 U.S. 658, 667-68 (1963). In any event, the period covered by the seasonal tariff has long since expired and the resolution of the jurisdiction to review the suspension order has no significant impact on the result of this case. The protective orders of this court and the Commission protect the rights of the petitioners in event the court finds it has a right to review the Commission's refusal to continue the investigation of the validity of the proposed tariff and finds it to be unlawful.

The critical issue in this case is whether jurisdiction exists to review the propriety of the Commission's termination of its investigation of the lawfulness of the proposed tariff. The United States and the petitioners vigorously assert jurisdiction exists. They contend that the proposed seasonal rate violates the long-and-short haul rate differential set forth in 49 U.S.C. § 4(1). Such section prohibits common carriers from receiving any greater compensation for transportation for a shorter haul than for a long distance haul over the same line or route in the same direction, or to charge greater compensation as a through rate than the aggregate of the intermediate rates. The statute also provides that the carrier upon application and investigation by the Commission in

special cases may be authorized by the Commission to charge less for longer than for shorter distances. No application under the foregoing provision has been made, investigated or considered by the Commission.

The Commission in its order above quoted acknowledges that the protestants have cited instances in support of their contention that the proposed tariff violates § 4(1). Protestants also urge that if more time were available additional violations could be found. Violation of the long-and-short haul provisions are denied by the railroads upon whom the burden rests to support the lawfulness of the tariff. The Commission in its order summarily holds that the evidence does not support § 4 violations to a sufficient extent to warrant suspension of the tariff and finds it unnecessary to further investigate the asserted violations. The Commission goes on to say: "However, respondents are admonished to take prompt action to remove violations of the long-and-short haul provision of Section 4(1) of the Act, if any. . . ." Reliance is also placed on the railroads' promise to avoid § 4 violations. This may be difficult to do with the approved tariff requiring payment of charges in accordance with the tariff provisions approved by the Commission. As heretofore stated, we are not reviewing the Commission's discretion to suspend the tariff.

We accept the view of the United States and the protestants that the suspension powers and investigation powers are separate and distinct. The Com-

mission has statutory authority to investigate the lawfulness of its tariffs. It is not contended that § 15(17) modifies or repeals the requirements of § 4 (1). In any event, we hold that it does not.

The factors which prompted the Supreme Court in *Arrow Transportation Co.* v. *Southern Railway Co.*, *supra*, to hold suspension orders not reviewable are not applicable to decisions of the Commission to refuse to make or to terminate an investigation of the lawfulness of a proposed tariff. The United States in support of its view at pp. 15 and 16 of its brief states:

> In contrast to the suspension power, Congress granted the Commission the power to investigate *proposed* rates because it viewed the power to investigate only *existing* rates as an inadequate remedy for the protection of shippers and the public. It authorized the Commission to order an investigation into proposed rates upon complaint by an interested party or upon its own initiative. *See* 49 U.S.C. 15(8)(a). The Commission's authority to investigate proposed rates before their effective dates was consciously made coextensive with its prior-existing power to investigate existing rates which were the subject of section 13(1) complaints. [I Sharfman, *The Interstate Commerce Commission* at 58 (1931)]. The Congressional purpose underlying sections 13(1) and 15(8) is the same, insofar as both authorize the Commission to investigate and make orders with respect to the legality of rates, differing only as to when the Commission commences its investigation. For purposes of judi-

> cial review, it is unreasonable to assume that Congress intended the Commission's power to investigate proposed rates to be a matter committed to the sole discretion of the agency. See S.Rep. No. 355, [61st Cong., 2d Sess.], at pages 8-9.

We note that the Supreme Court has not passed on the reviewability of the issues before us. *Aberdeen & Rockfish R. Co.* v. *SCRAP*, 422 U.S. 289, 317-18 (1975).

A finding that the court has jurisdiction to review the Commission's determination not to pursue its investigation is consistent with finding that the review of a similar action by the Commission is available. *Alton Railroad Co.* v. *United States*, 287 U.S. 229, 236-37 (1932). Likewise, the Commission's decision to terminate investigation commenced pursuant to § 13a(1), involving the discontinuance of service by a carrier, has been held to be reviewable. *City of Chicago* v. *United States*, 396 U.S. 162 (1969). In footnote 5 of that case at p. 166 the court states:

> The Administrative Procedure Act, 5 U.S.C. § 551(6) (1964 ed., Supp. IV), defines "order" as including a "negative" form of "a final disposition" by agency action. And that kind of "order" is subject to judicial review. 5 U.S.C. §§ 551(13), 701(b)(2), 702 (1964 ed., Supp. IV).
>
> When carriers file new rates, the Commission has authority on its own initiative or on complaint to make an investigation either with or without suspension of the new rates. 49 U.S.C.

§ 15(7). Where the Commission finds the proposed rates lawful, its order reads: "[T]he investigation proceedings [are] discontinued." See *Eastern Central Motor Carriers Assn.* v. *Baltimore & O.R. Co.*, 314 I.C.C. 5, 51. Such orders are reviewable. *Cooper-Jarrett, Inc.* v. *United States*, 226 F.Supp. 318, aff'd, 379 U.S. 6.

We recognize the right of review in rate cases is a narrow one. *See Atchison, Topeka & Santa Fe R. Co.* v. *Wichita Board of Trade*, 412 U.S. 800, 806-07 (1973) (plurality opinion); *North Dakota State Wheat Commission* v. *United States*, 565 F.2d 621 (8th Cir. 1977). The Commission's expertise in the field must be given considerable respect. The unlimited discretion would appear to have more weight in resolving economic issues. Significant policy reasons exist for review of the lawfulness of the proposed rate under the facts of this case. If the Commission's decision not to pursue an investigation of the factual background relevant to the legality issue is unreviewable, the protestants only resort would be to file a § 13(1) complaint once the rates became effective. The Commission has apparently limited its authority in such cases to the issue of whether the rate as applied is discriminatorily prejudicial or illegal. Moreover, in § 13(1) proceedings the burden is on the party challenging the lawfulness of the rate. In a § 15(8) proceeding the burden is on the railroad to establish the lawfulness and the reasonableness of the tariff.

It is the duty of the Commission in rate proceedings to investigate substantial issues relating to the lawfulness of the proposed tariff. While no formal hearing on the lawfulness issue was ordered by the Commission, the protestants' basis for declaring the tariff violated applicable statutes was clearly raised before the Commission. The Commission's order refusing to pursue the investigation reflects that it recognized and considered the protestants' claims. We believe that the Commission was derelict in its responsibility in refusing to pursue the investigation of the substantial charges of illegality which were made. Its order in effect made the proposed tariff operative and placed it in effect. Its order reflects no supporting findings or a reasonable basis for so doing, at least with respect to the charged § 4(1) violations. Its order in effect is a final order on the § 4(1) issue.

The Commission and the railroads urge that *Asphalt Roofing Manufacturers Association* v. *Interstate Commerce Commission*, —— F.2d —— (D.C. Cir. Oct. 17, 1977) (Nos. 75-1641 *et al.*), supports their position that the Commission's termination of its investigation is not a reviewable order.

We agree with the statement in that opinion reading:

> The Supreme Court in *Aberdeen & Rockfish R.R.* v. *SCRAP*, 422 U.S. 289, 314-18 (1975) (SCRAP II) . . . expressly declined to resolve the issue whether an ICC "decision that a *general* rate increase is justified by reason of reve-

> nue need is a final decision ripe for immediate review . . . . absent exhaustion of § 13 remedies. . . ." 422 U.S. at 217-18 n.18 (emphasis by the Court). The Court in *SCRAP II* did, however, hold that the Commission's conclusion at the close of a general revenue proceeding "that it need give no further *consideration* to environmental factors "under the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. §§ 4321-35 (1970), *in that proceeding*" was a final decision subject to judicial review, 422 U.S. at 318-19 (emphasis by the Court.)

Id. at —— (Slip op. at 11-12). We disagree with the conclusion that the Commission decisions not to pursue an investigation are under all circumstances not final decisions subject to judicial review and with the reasoning upon which such conclusion is based. *Id.* at — (slip op. at 12).

The substantial violations of specific statutory requirements here alleged, apart from the economic issues, are matters that should be fully investigated and decided with appropriate findings and conclusions. Failing so to do places the proposed tariffs in effect and is equivalent to a finding of lawfulness of the tariffs.

There is as great a justification for treating the Commission's order terminating the investigation as a final order subject to judicial review as there is for the holding in *Aberdeen & Rockfish R. Co.* v. *SCRAP, supra* at 318-19, that the Commission's determination in the general revenue proceeding to give no further consideration to environmental factors in

that proceeding is a final order subject to judicial review. As stated by the Court: "[W]hatever consideration of environmental matters is necessary or proper at the general revenue proceeding is over and done with when that proceeding terminates." A similar reasoning should apply when substantial charges of patent illegality in the tariffs are made.

We believe that the purposes of judicial and administrative efficiency will be best served by permitting review of the termination by the Commission of its investigation. Such procedure would eliminate the necessity of consideration of numerous potential § 13(1) complaints by the Commission and the court. As above noted, the burden in a § 13(1) proceeding would be on the complainants to show that the tariff was unlawful and that they were adversely affected by it.

The Commission in its brief, at pp. 11 and 12, states: "While it may be true that patently illegal tariff proposals may be rejected, we strongly assert that this is not the posture in the present case." We believe a substantial issue of patent illegality has been presented. The validity of such complaint was not determined by an adequate investigation. We express no view on whether the proposed tariff violates the short-and-long haul provision of § 4(1) but do hold that the charge has sufficient substance to require the Commission to investigate charges of such violation and to make appropriate findings and conclusions on the basis of such an investigation.

What has heretofore been said is sufficient in itself to require a vacation of the Commission's premature termination of its investigation of the § 4(1) charge and a remand of such issue to the Commission for an adequate investigation and findings based upon the investigation. A remand of such issue to the Commission for an adequate investigation and findings based thereon should be made.

We also have considerable doubt of the adequacy of the investigation with respect to the rate discrimination charges arising from the exemption of cars not owned by the railroads. Compensation for use of nonowned cars is prescribed by tariffs and the probability exists that the tariff compensation for the use of non-railroad cars has been paid. Thus a serious question arises whether illegal preference is given owners or lessees of privately owned cars to the detriment of shippers using railroad owned cars and whether by reason thereof producers and purchasers of grains shipped in railroad cars have been prejudiced by such an arrangement.

We hold that under the peculiar circumstances of this case charging patent illegality of the proposed tariff that the Commission's determination not to adequately investigate the charges should be vacated. This case is remanded to the Commission with directions to investigate the charges of patent illegality and to make findings and determinations based upon such investigation.

The Commission is directed to promptly hold hearings to investigate the charges of patent illegality

and to make detailed findings and conclusions with respect thereto.

If the Commission after investigation determines that the tariff is unlawful, it shall make appropriate provision for refund of increased charges collected under the tariff.

The Commission's order terminating its investigation of patent illegality charges is vacated and these cases are remanded to the Commission for further proceedings consistent with the views expressed in this opinion.

A true copy.

Attest:

Clerk, U. S. Court of Appeals,
Eighth Circuit

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 77-1729

SEABOARD ALLIED MILLING CORP., ARCHER DANIELS MIDLAND COMPANY, ADM MILLING CO., CONAGRA, INC., and DIXIE PORTLAND FLOUR MILLS, INC., PETITIONERS,

v.

INTERSTATE COMMERCE COMMISSION and UNITED STATES OF AMERICA, RESPONDENTS.

Petition for Review of an Order of the Interstate Commerce Commission

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Filed: September 22, 1977

Before MATTHES, Senior Circuit Judge, WEBSTER and HENLEY, Circuit Judges.

ORDER

On September 14, 1977 petitioners filed a petition for review of the Order of the Interstate Commerce Commission entered on September 14, 1977, in Suspension and Fourth Section Board Case No. 67123, and Office of Proceedings Docket No. 36663. Petitioners simultaneously filed a motion for stay or other

injunctive relief with respect to said order. On September 14 we granted a temporary stay and granted respondents until September 21, 1977 to respond.

In the interim several motions have been filed on behalf of various interested parties for leave to intervene. All pending motions to intervene are hereby granted.

In the order of the Interstate Commerce Commission sought to be reviewed, the Commission refused to suspend the September 15, 1977 effective date of proposed rate tariffs published by the Southern Freight Association increasing freight rates on railroad owned cars approximately 20% from September 15, 1977 to December 15, 1977. These so called demand-sensitive rates were based on § 202(d) of the Railroad Revitalization and Regulatory Reform Act of 1976, 49 U.S.C. § 15(17). In opposing the tariffs and in support of suspension thereof by the Commission, petitioners asserted, *inter alia*, that the new rates violated the longhaul-shorthaul provisions of 49 U.S.C. § 4(1), as well as §§ 1(5), 1(6), 1(11) to 3(1) and 15(17) of the Interstate Commerce Act. These contentions were rejected by the Commission.

Respondents contend that this Court is without jurisdiction to grant the stay, relying primarily upon *Arrow Transportation Co.* v. *Southern Ry.*, 372 U.S. 658 (1963). Petitioners contend that the patent illegality of the tariffs brings this case within an exception to *Arrow Transportation Co.* v. *Southern Ry.*, *supra*, at 671, n.22 and that the stay is necessary to

protect them from irreparable injury pending this Court's review of the merits.

We have reviewed the briefs and papers on file and have heard extensive oral argument by the parties and intervenors this date. Considering the circumstances by which this case comes to us, it appears to be *sui generis*. Petitioners have made a strong showing that this Court has jurisdiction to enter the stay. After balancing the equities under the traditional tests of *Virginia Petroleum Jobbers Assn* v. *F.P.C.*, 295 F.2d 921 (D.C. Cir. 1958), however, we are satisfied that the temporary stay heretofore granted should be and it is hereby dissolved.

Pending our determination of the merits of the petition for review, intervenor railroads are admonished to maintain such records as will be consistent with the accounting procedures established under 49 U.S.C. § 15, par. (8) (e) to enable prompt determination of overcharges should the contentions of petitioners prevail upon review.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

SEPTEMBER TERM, 1977

No. 77-1729

SEABOARD ALLIED MILLING CORP., ARCHER DANIELS MIDLAND COMPANY, ADM MILLING CO., CONAGRA, INC., and DIXIE PORTLAND FLOUR MILLS, INC., PETITIONERS,

vs.

INTERSTATE COMMERCE COMMISSION and UNITED STATES OF AMERICA, RESPONDENTS.

SEABOARD COAST LINE RAILROAD COMPANY, SOUTHERN RAILWAY COMPANY, LOUISVILLE AND NASHVILLE RAILROAD COMPANY, ILLINOIS CENTRAL GULF RAILROAD COMPANY and ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY, INTERVENOR-RESPONDENTS.

No. 77-1770

BOARD OF TRADE OF THE CITY OF CHICAGO, FS SERVICES, INC., ILLINOIS FARM BUREAU, ILLINOIS GRAIN CORPORATION, and ST. LOUIS GRAIN CORPORATION, PETITIONERS,

vs.

INTERSTATE COMMERCE COMMISSION, and UNITED STATES OF AMERICA, RESPONDENTS.

SEABOARD COAST LINE RAILROAD COMPANY, SOUTHERN RAILWAY COMPANY, LOUISVILLE AND NASHVILLE RAILROAD COMPANY, ILLINOIS CENTRAL GULF RAILROAD COMPANY and ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY, INTERVENOR-RESPONDENTS.

Petition for Review of an Order of the
Interstate Commerce Commission

JUDGMENT

This cause came on to be heard on petitions for review of an order of the Interstate Commerce Commission, appendix and briefs of the respective parties with oral argument.

On Consideration Whereof, it is now here ordered and adjudged by this Court that the Commission's order terminating its investigation of patent illegality charges is vacated and these cases are remanded to the Commission for further proceedings consistent with the views expressed in this opinion.

February 16, 1978

A true copy:

Attest:

/s/ Robert C. Tucker
Clerk, U. S. Court of Appeals,
8th Circuit

May 22, 1978

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

SEPTEMBER TERM, 1977

Nos. 77-1729 and 77-1770

SEABOARD ALLIED MILLING CORP. ET AL., and
BOARD OF TRADE OF THE CITY OF CHICAGO ET AL.,
PETITIONERS,

v.

INTERSTATE COMMERCE COMMISSION ET AL.,
RESPONDENTS,

and

SEABOARD COAST LINE RAILROAD COMPANY, ET AL.,
INTERVENOR-RESPONDENTS.

Petition for Review of Order of
Interstate Commerce Commission

The Court having considered petition for rehearing en banc filed by counsel for respondent, Interstate Commerce Commission, and, being fully advised in the premises, it is ordered that the petition for rehearing en banc be, and it is hereby, denied.

Considering the petition for rehearing en banc as a petition for rehearing, it is ordered that the petition for rehearing also be, and it is hereby, denied.

May 12, 1978.

APPENDIX D

[Service Date Sept. 14, 1977]

ORDER

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 2, held at its office in Washington, D.C. on the 14th day of September, 1977.

No. 36663

REJECTION OF TARIFF MATTER-DEMAND SENSITIVE RATES ON GRAIN SOUTHERN FREIGHT ASSOCIATION, AGENT

It appearing, That Southern Freight Association, Agent, has filed conversion table supplements to each of three tariffs for the purpose of increasing by 20% rates and charges on grain and related products to become effective September 15, 1977 to apply during the peak period for the movement of grain;

It further appearing, That Archer Daniels Midland Company; Conagra, Inc.; Dixie Portland Flour Mills, Inc.; Seaboard Allied Milling Corp., and ADM Milling Co., have filed a petition, as supplemented, for rejection of the said supplements alleging that the said supplements violate Section 4 of the Interstate Commerce Act; that the publications also violate Sections 1, 2, 3 and 15(17) of the Act as described in a verified complaint filed contemporaneously with the petition.

It further appearing, That no valid reason exists for the rejection of the tariff publication matter; and good cause appearing therefore:

It is ordered, That the petition for rejection be, and it is hereby, denied.

This is not a major Federal action significantly affecting the quality of the human environment with the meaning of the National Environmental Policy Act of 1969.

By the Commission, Division 2, Commissioners Murphy, Gresham and Clapp (Commissioner Clapp did not participate).

H. G. Homme, Jr.
Acting Secretary

[SEAL]

APPENDIX E

[Service Date Sept. 14, 1977]

ORDER

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D.C., on the 14th day of September, 1977.

No. 36663 [1]

DEMAND SENSITIVE RATES ON GRAIN AND SOYBEANS—SOUTHERN FREIGHT ASSOCIATION TERRITORY

This order concerns the following rate tariff schedules:

SOUTHERN FREIGHT ASSOCIATION, AGENT:

Supplement 23 to Tariff 972-F, I.C.C. S-1359 (Incentive Grain Tariff)
Supplement 201 to Tariff 988-A, I.C.C. S-909 (Southern Export Grain Tariff)
Supplement 137 to Tariff 908-B, I.C.C. S-999 (Southern Grain Tariff)
and any other related supplements.

Generally, these proposals involve a 20 percent increase on grain movements in railroad-owned cars between September 15 and December 15, 1977, in-

[1] Suspension No. 67123.

clusive. The proposals apply to barley, buckwheat, corn, corn screenings, grain sorghums, oats, rye, wheat, and soybeans from, to and between points in the Southern Territory, and Indiana and Illinois. See Appendix A for a listing of the STCC numbers.

The schedules were published by Southern Freight Association (SFA) pursuant to the regulations (49 CFR § 1109.10, as amended) established by the Commission in Ex Parte No. 324, *Standards and Expeditious Procedures for Establishing Railroad Rates Based on Seasonal, Regional, or Peak-Period Demand for Rail Service,* —— I.C.C. —— decided January 28, 1977.

Although optional under the regulations, a justification statement accompanied the tariff publication. Little cost evidence, also optional under the regulations, was offered. However, SFA did indicate that an incentive was necessary to help level-out the demand for rail cars during the peak season but that lower off-peak rates were not feasible since grain rates are generally depressed in the south.

More than 20 parties protested the proposal and assailed the justification statement. The principal objections were (1) the proposal is unreasonable and excessive and in violation of section 1(5) of the Interstate Commerce Act (the Act); (2) the proposal results in unjust discrimination, undue preference and prejudice in violation of sections 2 and 3(1) of the Act; (3) the proposal does not meet the goals set out in Ex Parte No. 324. SFA replied to these protests.

Several protestants also claim that the proposal would result in unauthorized departures from the long-and-short haul clause of Section Four of the Act. They offer rate examples purporting to demonstrate these departures. In rebuttal, respondent presents argument and tariff citations to disprove protestants' claims. In addition, respondent states that it intends to avoid any potential Section Four violations and it commits itself to making tariff changes to remove any of these called to its attention. The evidence offered to support the alleged violations of Section Four of the Act does not warrant suspension of this proposal. However, respondents are admonished to take prompt action to remove violations of the long-and-short haul provision of Section 4(1) of the Act, if any, in connection with inter-territorial and intra-territorial movements that may be caused by application of demand-sensitive rates on whole grains between points in southern territory.

Section 15(8)(d)(ii) of the Act conditions the Commission's power to suspend rates in excess of a just and reasonable maximum on a finding of market dominance. Some protestants offered evidence of market dominance in certain situations. However, there has been no attempt to demonstrate the existence of market dominance throughout the entire affected area. To the extent that market dominance may exist, we nevertheless decline to exercise our authority to suspend this experimental rate proposal, which appears to be in general conformity with the

goals of the Railroad Revitalization and Regulatory Reform Act of 1976 (4-R Act), because we are not convinced that protestants have sustained their burden on the section 1(5) assertions.

The section 2 and 3(1) issues are based on the applicability of the proposal, notably the exclusion of movements in private cars. The Commission has long recognized the justification for disparate treatment of private equipment. See, for example, *Switching at St. Louis and East St. Louis*, 120 I.C.C. 216,221 (1926).

Other section 2 and 3(1) matters are the result of the possibly overbroad scope of the proposal. However, insufficient evidence is available to warrant suspension on the basis of such assertions. The adverse effects predicted by protestants and the benefits advanced by SFA are speculative. This is an experimental rate increase and there is no way to predict with certainty the overall impact of the proposal.

We will order the respondent carriers to make weekly reports to this Commission demonstrating the effect of the schedules. This should not prove burdensome to the carriers since they already provide a large portion of the information to the Association of American Railroads. We stress that this action should not be viewed as a measure that will be used in future Ex Parte No. 324 filings. It is only being used here because of the unique circumstances and the broad application of the schedules.

The Commission was directed to establish a regulatory climate conducive to rate innovation and ex-

perimentation by the Congress in the 4-R Act. Ex Parte 324 was a direct result of that directive.

This is the first proposal filed pursuant to Ex Parte No. 324 regulations. The complaint sections of the Act protect, to a certain extent, the interests of those who may be adversely affected. Weighing the contentions before us and the clear Congressional purpose to permit experimental ratemaking, we will permit this temporary adjustment to become effective.

It is ordered, that the respondent carriers file, with the Secretary of this Commission, reports relating the effect of the schedules in terms of (1) car utilization (filled and unfilled orders by car types); (2) grain movements based on specific commodities and the stations or origin and destination; (3) carloadings by car type and commodity; (4) evidence of diversion; and (5) evidence of shipper rescheduling. Each weekly report shall be filed no later than two weeks after the end of the report week. A week, for the purpose of this proceeding, shall run from Thursday to Wednesday, inclusive. This requirement is subject to later refinement or modification by this Commission. Since several protestants raise allegations concerning an alleged disparate treatment between railroad-owned and privately-owned equipment, we will, out of caution, direct our Bureau of Investigations and Enforcement and Bureau of Operations to closely monitor this matter.

By the Commission. (Vice Chairman Clapp and Commissioner Christian did not participate.)

H. G. Homme, Jr.
Acting Secretary

[SEAL]

APPENDIX A

STCC No.	COMMODITY DESCRIPTION
0113110	Barley
0113210	Corn (not popcorn), in the ear, dried inc. not shelled
0113215	Corn (not popcorn), shelled, dried
0113310	Oats
0113410	Rice, rough
0113510	Rye
0113615	Darso grain
0113620	Durra
0113625	Feterita grain
0113630	Grohoma grain
0113635	Hegari (higera) grain
0113640	Kafir (kaffri) (kafir (kaffir) corn)
0113645	Kaoliang grain
0113650	Kalo grain
0113655	Milo (milo maize)
0113660	Shallu grain
0113665	Shrock grain
0113670	Egyptian wheat
0113690	Sorghum grain, nec. aao. sorghum grains, in mixtures
0113710	Wheat
0113720	Wheat, durum, amber or red
0113910	Buckwheat
0113915	Spelt
0113920	Emmer
0113925	Millet
0113930	Grain screenings, unground
0113990	Grain, nec
0114410	Soybeans, dried
0114415	Soybeans fresh

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